

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MEDICAL PROFESSIONAL LIABILITY	:	CIVIL ACTION
CATASTROPHE FUND	:	
	:	
v.	:	
	:	
	:	
PIC INSURANCE GROUP, INC.,	:	
<u>et al.</u>	:	NO. 97-4229

MEMORANDUM AND ORDER

BECHTLE, J.

JULY , 1997

Presently before the court is Plaintiff Medical Professional Liability Catastrophe Fund's (the "Fund") Motion to Remand this declaratory judgment action, and Defendants Kunsil Kim and Chung Soo Kim's (the "Kims") response thereto. For the following reasons, the court will grant the motion.

I. BACKGROUND

On September 4, 1996, the Kims, Defendants in this action, filed a medical malpractice diversity action in this court against Dr. Richard Hann. See Civ. A. No. 96-6047. On March 26, 1997, the Fund¹ filed a declaratory judgment action in the Commonwealth Court of Pennsylvania, seeking a declaration that it

¹ The Fund was created to pay "all awards, judgments and settlements for loss or damages against a health care provider entitled to participate in The Fund as a consequence of any claim for professional liability . . . to the extent such health care provider's share exceeds his basic coverage insurance in effect at the time of the occurrence." 40 Pa. Stat. § 1301.701(d).

was not required to cover or contribute to any judgment or settlement resulting from the Kims' claim against Dr. Hann. On April 22, 1997, the Kims filed a Notice of Removal in the Commonwealth Court, attempting to remove the declaratory judgment action to this court and join it with their medical malpractice action under the court's supplemental jurisdiction, 28 U.S.C. § 1367. On May 20, 1997, the Fund filed this Motion to Remand arguing that this court does not have subject matter jurisdiction over the declaratory judgment action.² On June 19, 1997, the Kims filed a responsive brief.

II. DISCUSSION

The Fund filed this action in the Commonwealth Court pursuant to Pennsylvania's Declaratory Judgment Act, 42 Pa. Con. Stat. Ann. § 7531 et seq. The Kims seek to remove it to this court and join it with their action against Dr. Hann. The Fund argues that because it is an alter ego of the Commonwealth, it is not a citizen within the meaning of the removal statute. Alternatively, it argues that if the court finds that it is a citizen, it is a citizen of Pennsylvania, and complete diversity is lacking because two of the Defendants in the declaratory judgment action are also citizens of Pennsylvania. (Pl.'s Mot. Supp. Remand at 3.) The Kims rely exclusively on 28 U.S.C. § 1367 and contend that this court has subject matter jurisdiction

² From the record, it also appears that all served Defendants did not join in the removal. However, because the parties do not raise this issue, the court will not address it.

because the declaratory judgment action "form[s] part of the same case or controversy" as the medical malpractice action that is pending before the court. (Defs.' Mem. Opp. Remand at 3.)

This court must remand the action because it does not have original jurisdiction and the removal statute prohibits removal of state actions to federal court when a defendant is a citizen of the state in which the suit is filed.

The federal removal statute provides that

[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .

(b) Any [diversity] civil action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441 (a), (b).

A. State Statutory Jurisdiction

The Fund is not a private insurer, but rather an executive agency of the Commonwealth of Pennsylvania, established pursuant to 40 Pa. Stat. Ann. § 1301.701 et seq.³ It is a Commonwealth party entitled to the benefits extended to the Commonwealth, including sovereign immunity. 42 Pa. Con. Stat. Ann. § 8501; DeVeaux v. Palmer, 558 A.2d 166, 167 (Pa. Commw. Ct. 1989). The

³ Diversity jurisdiction is absent between a state or its alter ego and a citizen of another state. Pennsylvania Human Relations Comm'n v. US Air, Inc., 615 F. Supp. 75 (W.D. Pa. 1985).

Commonwealth of Pennsylvania has vested original jurisdiction over actions brought by the Commonwealth in the Commonwealth Court. 42 Pa. Con. Stat. Ann. § 761; see also American Cas. Co. of Reading v. PHICO Ins. Co., 643 A.2d 91, 92 (Pa. 1994) (stating that original jurisdiction over Fund's declaratory judgment action is vested in Commonwealth Court). Under no circumstances does the statute allow for the exercise of jurisdiction over such actions by this court. Therefore, this court does not have jurisdiction to hear actions brought by the Commonwealth, and does not have original jurisdiction within the meaning of 28 U.S.C. § 1441.

B. Original Federal Jurisdiction

Even if the court were to find that jurisdiction is not statutorily vested in the state courts, this court does not have original jurisdiction because there is no federal question presented and complete diversity of citizenship is lacking. Thus, the action could not have originally been filed in this court.

The Fund's declaratory judgment action involves payment of a judgment resulting from a state law medical malpractice action. It does not "arise under the Constitution, laws, or treaties of the United States," and therefore does not invoke this court's federal question jurisdiction under 28 U.S.C. § 1331. The action names the following defendants: PIC Insurance Group, Inc., a Pennsylvania citizen, Dr. Richard S. Hann, a Pennsylvania citizen, and Kunsil Kim and Chung Soo Kim, Massachusetts

citizens. If the Fund were not a Commonwealth party, it would be a Pennsylvania citizen. Defendants Hann and PIC are both Pennsylvania citizens. Complete diversity of citizenship is lacking, and the court cannot exercise subject matter jurisdiction under 28 U.S.C. § 1332. Therefore, the court does not have original jurisdiction over this action under 28 U.S.C. § 1441.

C. State Citizenship

The removal statute also provides another reason why this action cannot be removed to federal court. That statute provides that diversity actions shall be removable to federal court "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which the action is brought." 28 U.S.C. § 1441(b). Because Defendants Hann and PIC are Pennsylvania citizens, the action cannot be removed to federal court.

Thus, the court cannot exercise supplemental jurisdiction over the claims in this action which could not have originally been brought here. Accordingly, it will remand the action to the Commonwealth Court.

III. CONCLUSION

For the above reasons the court will grant the Fund's Motion to Remand.

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ORDER

AND NOW, this ____ day of July, 1997, upon consideration of Plaintiff Medical Professional Liability Catastrophe Fund's Motion to Remand and Defendants Kunsil and Chung Soo Kim's response thereto, IT IS ORDERED that said motion is GRANTED and this action is REMANDED to the Commonwealth Court of Pennsylvania. The Clerk of Court is ordered to return the file to the appropriate court.

LOUIS C. BECHTLE, J.